IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 625

THE GEORGIA RAILWAY & ELECTRIC COMPANY,
GEORGIA RAILWAY & POWER COMPANY AND
GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

REPLY BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

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SUBJECT INDEX

Pages

List of cases and authorities cited in brief ..... II, III

Appellee's Brief, Pages 2–6, Incorrectly Asserts that "The Mandate (of this Court) While Reversing the Judgment of the Supreme Court of Georgia, Left The Tribunals of the State at Liberty to Exercise Their Proper Jurisdiction in the Case Between the Parties." 1

Sections III and IV (Pages 6–12), of Appellee's Brief, Erroneously Contends that "The Supreme Court of Georgia Was Not Precluded Either by the Decision of This Court Or by the Rule of 'The Law of the Case' from Construing the Statutes and Ordinances as It Did in Its Last Decision 2

Reserved Power of State to Amend or Appeal Appellants' Charters and of the Police Power of the State, Are Not Involved 7

Contention of Appellee That the Decision of the Supreme Court of Georgia Rests Upon an Independent, Non-Federal Ground of Estoppel (Section IX, Pages 18–23 of Appellee's Brief) is Not Well Founded 8

Appendix "A" 12–18

The State's Reserved Power to Alter or Amend Private Charters and the Question of Police Power of the State, Is not Involved in the Case at Bar 12

Cases Dealing with Police Power and Regulation Are Not Applicable 15

ALPHABETICAL LIST OF CASES AND AUTHORITIES CITED IN BRIEF

	Pages
Brooks v. Railroad Co., 102 U. S. 107	11
Durant v. Essex Co., 101 U. S. 555, 566	4
Ex Parte Sibbald, 12 Peters 488, 492	3
Ex Parte Union Steamship Co., 178 U. S. 317	2
Gaines v. Rugg, 148 U. S. 228, 239	5
Gila Reservoir Co. v. Gila Water Co., 205 U. S. 279	9
Hartford Life Insurance Co. v. Blincoe, 255 U. S. 129	2
Hickman v. Ft. Scott, 141 U. S. 415	4
Home Street Railway Co. v. City of Lincoln, 162 Fed. 133	5–11
In Re Potts, 166 U. S. 263, 265	6
Illinois v. Illinois Central Rd. Co., 184 U. S. 77; 92	11
Keystone Pecan Co. v. Clark, 149 Ga. 836	8
Mackall v. Richards, 116 U. S. 45, 47	5
Messinger v. Anderson, 225 U. S. 436	7
Sanders v. Mayor, etc., of Gainesville, 141 Ga. 441	9
Sneider Granite Co. v. Gast Realty Co., 245 U. S. 288, 290	2
United States v. Mayer, 235 U. S. 55, 67	5
United States v. New York Indians, 173 U. S. 464, 471	10
Ward v. Board of Comm. of Love County, 253 U. S. 17	8
Washington Bridge Co. v. Stewart, 3 How. 413, 425	3
Wetmore v. Karrick, 205 U. S. 141, 157	4–10

CONSTITUTION OF THE STATE OF GEORGIA, TEXT BOOKS, STATUTES, AND CASES CITED IN APPENDIX "A"

Pages

Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 18 (Code Section 6446 [1910]; Section 22-201 [1933]) 12

Constitution of the State of Georgia, Art. 1, Sec. 4, Par. 18 (Code Section 6391 [1910]; Section 2-401 [1933]) 13

Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 8 (Code Section 6437 [1910]; Section 2-1808 [1933]) 13

Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 17 (Code Section 6445 [1910]; Section 2-2503 [1933]) 14

14 Corpus Juris, "Corporations," P. 95, Sec. 58; P. 117, Sec. 106; P. 182, Sec. 184 12-13

Chicago, etc., Rwy. Co. v. Wisconsin Rd. Comm., 237 U. S. 220, 234 14

City of Augusta v. Augusta-Aiken Rwy Corp., 150 Ga. 529 15

City of Brunswick v. Gordon Realty Co., 163 Ga. 636, 641 16

City of Knoxville v. Knoxville Power & Lt. Co., 68 S. W. (2d) 936 17

Fielders v. New Jersey St. Railway Co., 53 Atl. 405; 54 Atl. 822 17

Pages

French v. Barber Asphalt Paving Co., 181 U. S. 324, 343 15

Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683, 697, 698 13

Piedmont Cotton Mills v. Georgia Rwy. & Elec. Co., 131 Ga. 129, 152 17

Southern Rwy. Co. v. Atlanta Railway & Power Co., 111 Ga. 679 17

Southern Rwy. Co. v. Rome Railway & Lt. Co., 139 Ga. 726 17

United Railways & Electric Co. v. Mayor of Baltimore, 127 Md. 660; 96 Atl. 880 17

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I.

Appellee's Brief, Pages 2-6, Incorrectly Asserts That "The Mandate (of This Court) While Reversing the Judgment of the Supreme Court of Georgia, Left the Tribunals of the State at Liberty to Exercise Their Proper Jurisdiction in the Case Between the Parties."

The decisions of this Court cited in appellee's brief state the principle that "the questions in terms discussed and de-

cided" by this Court are controlling and binding upon the inferior court as the law of the case. For instance, in *Hartford Life Insurance Co. v. Blincoe*, 255 U. S. 129, this Court held:

> "In determining how far a decision of this court reversing a judgment of a state court binds that court on a second trial, the principle of res judicata, that all that might have been decided is presumed to have been decided, is inapplicable; and only *those matters* which were, not merely presented and argued here, *but actually considered and decided by this court, are foreclosed.*" (Italics ours.)

Of course, "the opinion of this Court may be considered to ascertain exactly what was decided and settled."

Ex Parte Union Steamship Co., 178 U. S. 317.

The further proceedings in the State court cannot be "inconsistent with the opinion of this court."

Sneider Granite Co. v. Gas Realty Co., 245 U. S. 288, 290.

What was formerly considered and decided by this Court in the first appeal has been discussed in appellants' original brief. Pages 13–22.

II.

Sections III and IV (Pages 6-12), of Appellee's Brief, Erroneously Contend that "The Supreme Court of Georgia was not Precluded Either by the Decision of this Court or by the Rule of 'The Law of the Case' from Construing the Statutes and Ordinances as it Did in its Last Decision."

The legal principle that the Supreme Court of the United States accepts the construction by the highest court of the State of a statute of such State is fully recognized. When the construction of a State statute arises this court deter-

mines how such statute has been construed by the State court and then renders a judgment with reference to this question.

The construction of the Georgia statutes was before this court on the first appeal. This question was discussed and considered by this court and a judgment rendered on this question, which judgment was final and conclusive in the case in which it was rendered.

In *Ex Parte Sibbald*, 12 Peters 488, 492, this court held:

> "Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. 1 S. C. 194, 197; 1 H. & M. 557; 3 Munf. 229. *After a mandate, no rehearing will be granted.* It is never done in the house of lords; 3 Dow. P. C. 157; and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. 5 Cranch, 316; 7 Wheat. 58, 59; 10 Wheat. 443." (Italics ours.)

In the case of *Washington Bridge Co. v. Stewart*, 3 How. 413, 425, this Court held that it has no power to review its decision; and after the expiration of the term at which it was rendered, it becomes finally binding and conclusive though rendered by a divided court. In that case, this court, after stating that it only had appellate jurisdiction over final decisions of inferior courts, held:

> "The want of power in this court, to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question. * * * A final judgment of this court is supposed to be conclusive upon the rights it decides, and no statute has

> provided any process by which this court can reverse its judgment. In several cases formerly adjudged in this court, the same point was argued and expressly overruled. It was solemnly held, that the final decision of this court was conclusive upon the parties, and could not be re-examined."

See also *Wetmore v. Karrick, 205 U. S. 141, 157.*

In the same case and after this Court has issued its mandate, it will not change or alter its former decision rendered therein.

If this Court will not grant a re-hearing as to questions heard and decided by it after its mandate is issued, can the inferior or State court exercise a greater power or authority over this court's decisions than it will itself exercise? Every previous decision of this court on this subject has refused to permit the State or inferior court to exercise any such power, jurisdiction or authority. (See cases cited in appellants' original brief, pages 14–15).

In *Durant v. Essex Company*, 101 U. S. 555, 566, this Court held that the inferior court "has no power to rescind or modify what we have established. Our judgment by divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous."

In *Hickman v. Ft. Scott*, 141 U. S. 415, a judgment of an inferior court had been reversed. When the case was remanded to the inferior court, there was an application by petition "to make a case materially different from that presented to the court of review." This Court held that the lower court had no power to entertain such motion, and held:

> "We know of no precedent for such a proceeding as this, nor is there any principle of law upon which it could be based. * * * So strongly has this principle been applied by this Court that, while realizing that *there is*

> *no court which can review its decisions*, it has invariably refused all applications for a rehearing made after an adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court." (Italics ours.)

In *Mackall v. Richards*, 116 U. S. 45, 47, after this Court had considered and passed upon an appeal in said case and after its mandate was received by the inferior court, a motion was made to set up new matters. This Court held that such motion was properly denied. No discretion was left in the inferior court to grant such motion.

In *Gaines v. Rugg*, 148 U. S. 228, 239, it was contended the inferior court had a right "to proceed in the case, in the language of the mandate not merely 'in conformity with the opinion and decree of this court' but also 'according to right and justice.' * * * In other words, that the whole controversy was to be reopened as if it never had been passed upon by this court." This Court held: "This cannot be allowed, and is not in accordance with the opinion and mandate of this court."

In *Home Street Railway Co. v. City of Trenton*, 162 Fed. 133 (2); 137 (2), the United States Circuit Court of Appeals, Eighth Circuit, in a decision rendered by Judge Van De-Vanter, held that the inferior court (Circuit Court of the United States) "is without authority to correct a judicial error in one of its decrees upon simple motion or petition after the term at which the decree was rendered." (See authorities cited and collected on Page 137 of said opinion.)

See also: *United States v. Mayer*, 235 U. S. 55, 67.

Under the Constitution of Georgia the Supreme Court of Georgia has no original jurisdiction.

Said Constitutional provision, codified in Code of 1910, Section 6502; Code of 1933, Section 2-3005, provides:

> "The Supreme Court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors of law," etc.

The Constitution of the State of Georgia requires the Supreme Court to dispose of every case at the first or second term after writ of error is brought. This Constitutional provision, codified in Code of 1910, Section 6503; Code of 1933, Section 2-3006, provides:

> "The Supreme Court shall dispose of every case at the first or second term after such writ of error is brought;" etc.

After the adjournment of the term of court in which a decision is rendered "no motion for a rehearing will be considered by this (Supreme Court of Georgia) court unless the same is filed in the office of the clerk thereof during the term at which the judgment sought to be reviewed was rendered."

Code of 1910, Section 6257; Code of 1933, Section 24–4544

After this Court has considered and decided the questions brought before it in a former appeal, the inferior court has no power or authority to again consider what has been passed upon and held by this Court. It is bound by the judgment, opinion and decree of this Court and "cannot vary it or examine it for any other purpose than execution, or give any other or further relief; *or review it*, even for apparent error upon any matter decided on appeal."

In Re Potts, 166 U. S. 263, 265.

The cases cited in appellee's brief, pages 9-12, are not applicable to the case at bar. In each of those cases the changed construction of a State statute by the State court arose in another and different case than that in which this Court had rendered a decision. In no case has this Court

itself changed or altered its former decision made in the same case, nor has it permitted the inferior court to review or change what has been decided by this Court on a former appeal.

The case of *Messinger v. Anderson*, 225 U. S. 436, repeatedly cited by appellee, is not in point. That case involved the construction of a will affecting title to property located in a State. The Circuit Court of Appeals had construed the will in a certain manner. Subsequent thereto the State court adopted a different construction of the will. An appeal was taken to this Court, one of the exceptions being that the Circuit Court of Appeals had erroneously construed the will. This Court had never considered or passed upon such question nor rendered any decision with reference thereto. This Court adopted and followed the State court's construction of the will, holding that in any conflict between decisions of the State and Federal Courts, this Court is free when the case *comes before it*, to decide such question. In that case this Court did not change, alter or modify any previous decision rendered by it in the same case.

III.

Reserved Power of State to Amend or Appeal Appellants' Charters and of the Police Power of the State are not Involved.

Appellee's contentions on these questions were before this Court on the first appeal and the decision of this Court with reference thereto is the law of the case. (However these questions are discussed in Appendix "A" to this reply brief.)

The cases of this Court cited on pages 15–17 of appellee's brief are cases in which the Supreme Court of a State had held that certain general acts of the State Legislature there

construed were amendments or alterations of the *utility's charter* and, therefore, such amendments placed *charter* obligations upon the street railway company. In the case at bar, the Supreme Court of Georgia could not hold and did not hold that the local acts amending the charter of the *municipality of Decatur* was an amendment to appellants' charter.

IV.

Contention of Appellee That the Decision of the Supreme Court of Georgia Rests Upon an Independent, Non-Federal Ground of Estoppel (Section IX, Pages 18-23 of Appellee's Brief) is not Well Founded.

The jurisdiction of this Court to review a judgment of a State court, the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable.

Ward v. Board of Commissioners of Love County, 253 U. S. 17.

The doctrine of estoppel is not only plainly untenable in the case at bar, but to invoke such doctrine denies appellants due process of law for they never had any legal hearing on this question:

(a) No question of estoppel was raised by the pleadings.

"An issue not made by the pleadings of either party is not before the court."

Keystone Pecan Co. v. Clark, 149 Ga. 836.

(b) There was no evidence in the case establishing an estoppel.

"No estoppel against the plaintiffs can arise on account of the fact that the pavement was completed

before the filing of the petition, especially in view of the evidence, which shows that they filed their written protest against the construction of the work before it was started. 25 Am. & Eng. Law, 1206. * * *

"Provision is made for a remedy by illegality, by which a property owner is afforded a hearing as to the reasonableness or lawfulness of the assessment before he is finally required to pay the assessment. Having such a remedy, the property of abutting landowners is not taken without due process of law."

Sanders v. Mayor, etc., of Gainesville, 141 Ga. 441, 444, 445.

(See also original brief of appellants, pages 22–28.)

The general rule of law is that parties are bound in the appellate court by the case made by the pleadings and the evidence and cannot urge questions not presented in the lower court.

(c) The appellee never raised or urged the question of estoppel against appellants in the trial court.

(d) The doctrine of estoppel was not urged by appellee when this case was first before the Supreme Court of the State of Georgia.

(e) The doctrine of estoppel was not raised upon the first appeal of this case to this Court.

(f) The principle of estoppel was not set out or urged by appellee in the motion made by it to the Supreme Court of Georgia requesting further consideration of this case after the mandate of this Court was issued. (See record, pages 162–165.)

A failure of a party to make a contention is, generally speaking, equivalent to making it and having it overruled or waiving it.

Gila Reservoir Co. v. Gila Water Co., 205 U. S. 279, 264.

United States v. New York Indians, 173 U. S. 464, 471.

After the Supreme Court of the State of Georgia rendered its decision in this case on September 18, 1934, and said decision was brought to this Court for review, it lost jurisdiction over the case. The claimed notice which appellee gave appellants, seeking to have the Supreme Court again take jurisdiction of the case, does not set out, claim or raise the question of estoppel.

(See Record, pages 162–165.)

If any proper or legal notice had set up or claimed estoppel against appellants, appellants could have shown that in previous litigation between the parties, and with reference to the very same assessment to be collected against appellants, appellee had successfully contended that appellants could not be heard to contest the assessment or raise the question of their liability therefor until the municipality undertook to collect the same against appellants.

(See Appendix "A" to original brief of appellants.)

Appellants were given no notice of any claim of estoppel and were given no hearing with reference thereto and, therefore, the judgment rendered on the basis of estoppel by the Supreme Court of Georgia is void and was a denial to appellants of the due process of law.

In the case of *Wetmore v. Karrick*, 205 U. S. 141, 142; 157, 158, this Court held:

> "The question here involved pertains to a case where no notice was given and a new and different judgment is entered at a subsequent term. It is urged when the necessary facts appear in the record such correction can be made without notice, because, it is said, there is nothing to litigate. But aside from the fact that this proposition ignores the rule that jurisdiction once lost

can only be regained by some proper notice, the case at bar is an illustration that such action may impair the substantial right of the party to be heard against the rendition of a new judgment against him."

See also: *Home Street Railway Co. v. City of Lincoln*, 162 Fed. 133, (4), (5), and what is said on page 138, where the court holds that the proceeding there undertaken violated "the fundamental principles of due process of law."

As heretofore shown (pages 5 and 6 of this reply brief), under the Constitution of the State of Georgia the Supreme Court of that State has no original jurisdiction and must dispose of all cases at the first or second term after writ of error is brought. Further, under the statutory law of Georgia, no motion for a rehearing will be considered by the Supreme Court of Georgia unless the same is filed during the term at which the judgment sought to be reviewed was rendered.

In this connection see: *Brooks v. Railroad Co.*, 102 U. S. 107.

Upon the return of this case to the Supreme Court of Georgia, under the mandate of this court, the question of estoppel was not before the said Georgia Supreme Court.

Illinois v. Illinois Central Rd. Co., 184 U. S. 77; 92.

APPENDIX "A"

The State's Reserved Power to Alter or Amend Private Charters and the Question of Police Power of the State is not Involved in the Case at Bar.

The Legislative Acts in question were neither an amendment nor an attempted amendment to Appellants' charter.

The special local acts in question, amending the charter of the City of Decatur, are not amendments to the charter of the Georgia Power Company or of Appellants. The Constitution of the State of Georgia, Art. 3, Section 7, Par. 18 (Georgia Code 1910 Section 6446; Code 1933, Section 2-1818; Code 1933, Sec. 22-201) prevents the Legislature of Georgia itself from granting charters by special acts to appellants. This constitutional provision is as follows:

> "General assembly shall have *no* power to grant corporate powers and privileges to private companies. * * * All corporate powers and privileges to * * * railroad * * * companies shall be issued and granted by the Secretary of State in such manner as shall be prescribed by law; and if in any event, the Secretary of State shall be disqualified to act in any case, then in that event the legislature shall provide by general laws by what person such charters shall be granted."

In this connection see—

> 14 C. J. "Corporations," page 95, Section 58; page 116, Section 106.

Under State constitutional provisions a special Legislative act undertaking to grant a charter to a street railway company would be unconstitutional.

Any amendment to or change in the charter of street railway companies must be made under the same authority as is necessary for its creation in the first instance. Charters of street railway companies cannot be amended except under constitutional provisions relating to its creation.

14 C. J. "Corporations," page 182, Section 184.

Any amendment to or change in appellants' charters must be made by the Secretary of State under general laws.

The Constitution of the State of Georgia, Art. 1, Sec. 4, Par. 1 (Code 1910, Section 6391; Code 1933, Section 2-401), provides:

> "No general law affecting private rights shall be varied in any particular case by *special* legislation, except with the free consent in writing, of all persons to be affected thereby * * * *."

In *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683, 697, 698, this Court held:

> "The clause in that act (referring to a State's reserved power of amendment or repeal) declaring that 'no alteration or amendment to the charter of the gas company shall be made without the consent of the city council and the directors of the gas company,' plainly expresses, we think, the intention that the company's charter should not be amended or repealed 'at the will of the legislature.'"

The charters of appellants could not be changed, modified or affected by the special local acts in question which merely amend the municipal charter of Decatur.

The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 8 (Code 1910, Section 6437; Code 1933, Section 2-1808), provides:

> "No law or ordinance shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof."

The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 17 (Code Section 1910; Section 6445; Code 1933, Section 2-2503), provides:

> "* * * the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made."

The charters of appellants were not referred to either in the title or body of the acts in question.

Even a general statute does not constitute an amendment to a charter of a corporation unless it corrects, improves, reforms, rectifies or alters something in the original charter. A general law, even applicable to all corporations, is not an amendment to their charters where it is not explicitly so declared by the legislature.

> *Chicago, etc., R. Co. v. Wisconsin Rd. Commission,* 237 U. S. 220, 234.

Cases dealing with the reserved right of the State to amend corporate charters by enacting general laws and thereby imposing charter obligations are not applicable to the local statutes in question for they were not and could not be construed as an amendment or alteration of any of appellants' charters.

There has never been any contention in this case that the legislature did not have a right to amend the municipal charter of the City of Decatur. There is no contention of any constitutional violation of the obligation of contracts. An amendment of Decatur's municipal charter does not create a charter obligation against appellants for their charters are not affected by such local act.

Appellants' contention is that they are entitled to the same and equal constitutional protection accorded others and that assessments for local improvements can not be made or sustained as against them on some other basis than that applied to other property owners.

Cases Dealing With Police Power and Regulation are not Applicable.

In the opinion of the Supreme Court of Georgia rendered on September 30, 1935, the court held that the authority of the Legislature to enact the assessment statute in question "comes both within the taxing and police power reserved in the State." The authority or power of the State to enact the statutes is not questioned. The Courts have generally agreed that the authority to require the *property* specially benefited to bear the expense of local improvements is a branch of the taxing power.

The Court in *French v. Barber Asphalt Paving Company*, 181 U. S. 324, 343, held:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited. * * *"

In the case of *City of Augusta v. Augusta-Aiken Ry. & C. Corporation*, 150 Ga. 529, the Supreme Court held that a similar local assessment statute applicable to the City of Augusta, Georgia, was an exercise of the taxing power. In this case the court held that special municipal paving assessments against street railway companies for a portion of the costs of paving a street in which the tracks are located is an exercise of the taxing power and not of the police power. In this case a contract relieving the street railway from the assessment was upheld as legal and valid. A municipality cannot make a valid contract affecting or surrendering its police power. In holding that the contract was not a surrender of the City's police power, the court expressly held that such special assessments against street railway companies were not made under the police power conferred upon a municipality.

The court on page 532 (150 Ga.) held:

> "While the act of the city in laying street paving assessments is the exercise of the taxing power in a general sense, such assessments are not taxation within the meaning of the constitutional provision requiring taxation to be ad valorem and uniform."

That the Acts in question are not a police regulation is shown by the provisions of the Act.

(a) They are revenue acts and not regulatory acts.

(b) They do not require property owners or street railway companies to construct or make any improvements.

(c) The statutes authorize the commissioners of the municipality (City of Decatur) "to grade, regrade; pave, repave; build, rebuild, or otherwise *improve* or *reimprove* any of the streets," etc.

(d) The acts are revenue acts authorizing *the city* to make *improvements* and *raise funds for the improvements it* makes.

(e) The assessments are made a general lien upon property from the time of the passage of the assessment ordinance.

(f) The city clerk is authorized to issue an execution for the amount of the special assessment.

(g) The execution is to be levied "as in the case of sales of realty for city taxes."

(h) The lien for this special tax is given priority next to the lien for general taxes.

In the *City of Brunswick v. Gordon Realty Company*, 163 Ga. 636, 641, the Supreme Court of Georgia held:

> "As the issuance of an execution creates a lien under which the municipal authorities may seize and sell the property improved, it follows further that in doing

these acts, that is, in issuing the execution, seizing and selling under it, the municipality exercises the *taxing* power."

(i) The acts in question are not based upon any claimed police power or authority vested in the municipality. They provide that it is "additional and cumulative to other provisions now in force and in effect in said city."

Special attention is called to the case of *United Rwys. & Elec. Co. v. Mayor of Baltimore*, 127 Md. 660; 96 Atl. 880.

See also:

Fielders v. N. Jersey Street R. Co., 53 Atl. 405, 54 Atl. 822; 68 N. J. L. 343, 59 L. R. A. 455,

where the court held that special paving assessments against street railway companies occupying the streets were an exercise of the taxing power and could not be supported under the claim of a police regulation.

See also:

City of Knoxville v. Knoxville Power & Lt. Co., 68 S. W. (2d) 936.

In Georgia, street railway companies do not impose an additional burden upon the streets.

Southern Ry. Co. v. At. Ry. & Power Co., 111 Ga. 679.

Piedmont Cotton Mills v. Georgia Ry. & Elec. Co., 131 Ga. 129, 152.

Southern Ry. Co. v. Rome Ry. & Lt. Company, 139 Ga. 726.

The paving in question was not done by the City of Decatur under any police power of the City of Decatur.

It had police power in its original charter. The paving was done under an act giving the Municipality the right "*to improve the streets.*" The acts provided that it was "additional and cumulative to other provisions now in force and effect in said city." The power given to the Municipality to assess other property owners is based exclusively upon corresponding benefits. Under the equal protection clause of the Federal Constitution appellants and their property are entitled to the same protection.

Respectfully submitted,

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